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No. 10-1029

Supreme Court, U.S.
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In the Supreme Court of the United States

ROBERT MARTINEZ, *ET AL.*,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners Robert Martinez *et al.* (collectively, "Martinez") present two questions to this Court in their challenge to the tuition charged by Respondents California Community College ("CCC"), California State University ("CSU"), and University of California (collectively, the "Universities"):

1. Whether a state statute that defies the congressional intent behind 8 U.S.C. §1623 by providing resident tuition rates at public postsecondary institutions to illegal aliens and declaring that it is granting those benefits to illegal aliens not on the basis of "residence" in the state, but on the basis of attending a high school in the state, is expressly preempted.
2. Whether a court must undertake conflict preemption analysis after concluding that an express preemption provision does not apply in a case involving both types of preemption claims.

Amicus curiae Eagle Forum Education & Legal Defense Fund respectfully submits that this Court must answer both questions in the affirmative.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit organization founded in 1981 and headquartered in Saint Louis. For thirty years, Eagle Forum has defended American sovereignty and promoted adherence to the U.S. Constitution. Eagle Forum has

[1] *Amicus* files this brief with consent by all parties, with 10 or more days' prior written notice; the parties' written letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For the foregoing reasons, Eagle Forum participated as *amicus curiae* before the California Supreme Court in this litigation, and it has direct and vital interests in the issues that petitioners present to this Court.

CONSTITUTIONAL BACKGROUND

This litigation implicates the "[p]ower to regulate immigration," which "is unquestionably *exclusively* a federal power," applied in the area of post-secondary education. *DeCanas v. Bica,* 424 U.S. 351, 354 (1976) (emphasis added). "Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs." *Toll v. Moreno,* 458 U.S. 1, 10 (1982) (citations omitted). In seeking to enforce federal immigration law against state institutions, Martinez relies on two clauses of the U.S. Constitution.

Under the Supremacy Clause, federal law preempts state law whenever the two conflict. U.S. CONST. Art. VI, cl. 2. Courts have identified three ways in which the Supremacy Clause can preempt state or local laws: express preemption, "field" pre-emption, and implied or conflict pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). In determining a statute's preemptive scope, congressional intent is "the ultimate touchstone." *Wisconsin Dep't of Indus., Labor & Human Relations*

v. Gould, 475 U.S. 282, 290 (1986). Under *Santa Fe Elevator* and its progeny, however, courts often apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1, cl. 4. The Equal Protection Clause "essentially ... direct[s] that all persons similarly situated ... be treated alike," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), because – even under the rational-basis test – the "Constitution neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (interior quotations omitted). Although Martinez's equal-protection claim is not before the Court,[2] the equal-protection argument is relevant to preemption.

STATUTORY BACKGROUND

This litigation concerns the interplay between §68130.5 of California's Education Code and two sections of federal immigration law enacted in 1996, 8 U.S.C. §1621 and §1623.

§1621 and PRWORA

Enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), §1621 provides that illegal aliens are

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[2] The Universities did not appeal the Court of Appeal's remand of the Equal Protection issue.

"not eligible for any State or local public benefit," excepting certain enumerated emergency-related benefits, 8 U.S.C. §1621(a)-(b), unless §1621(d)'s exception applies. 8 U.S.C. §1621(a), (d). In pertinent part, a "State or local public benefit" includes "postsecondary education ... benefit[s]." 8 U.S.C. §1621(c). The legislative history confirms that Congress preempted all then-current benefits for illegal aliens:

> No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens.

H.R. CONF. REP. NO. 104–725, at 383 (July 30, 1996). In doing so, however, Congress allowed states to enact *new,* post-PRWORA benefits for illegal aliens under certain conditions.

Specifically, and notwithstanding §1621(a)'s express preemption of the entire field of pre-enactment benefits to illegal aliens, §1621(d) authorizes states to adopt post-PRWORA statutes that "affirmatively provide[]" such otherwise-proscribed benefits to illegal aliens:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be

> ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. §1621(d). PRWORA also provided that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). The Conference Report explains that "it continues to be the immigration policy of the United States that noncitizens within the Nation's borders not depend on public resources," but also notes that "noncitizens ... have been applying for and receiving public benefits at increasing rates." H.R. CONF. REP. NO. 104–725, at 378. In response to that development, Congress found "that it is a compelling government interest to enact new eligibility and sponsorship rules to assure that noncitizens become self-reliant and to *remove any incentive* for illegal immigration." *Id.* (emphasis added).

§1623 and IIRIRA

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), §1623 denies in-state postsecondary tuition to illegal aliens on the basis of residence unless non-resident U.S. citizens are eligible for the same benefit:

> *Notwithstanding any other provision of law,* an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence* within a State (or a political subdivision) for any postsecondary

> education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) *without regard to whether the citizen or national is such a resident.*

8 U.S.C. §1623 (emphasis added).

As initially approved by the Senate, §1623's precursor applied to *any benefit*, not only to postsecondary education benefits:

> BENEFITS OF RESIDENCE
> Notwithstanding any other provision of law, no State or local government entity shall consider any ineligible alien as a resident when to do so would place such alien in a more favorable position, regarding access to, or the cost of, any benefit or government service, than a United States citizen who is not regarded as such a resident.

S.1664, 104th Cong. §201(a)(2) (1996). The Committee Report explained that this section provided that "State or local governments may not treat an ineligible alien as a resident, if such action would treat the alien more favorably than a non-resident U.S. citizen." S. REP. NO. 104–249, at 22 (Apr. 10, 1996). The floor debates in both the House and Senate included un-rebutted statements from sponsors that the bill would deny in-state tuition to illegal aliens. *See* Pet. at 21.[3]

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[3] *See* 142 Cong. Rec. H11376-77 (daily ed. Sept 26, 1996) (Rep. Cox) ("[n]ow if I move from California to Indiana, I am not going to get in-State benefits

The Conference Report provides that the "House recedes to Senate amendment section 201(a)(2) with modifications" and that "[t]his section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education," H.R. CONF. REP. NO. 104–828, at 240 (Sept. 24, 1996), amending the section to its current form. *Id.* at 134. Although successfully reported out of conference, the bill – H.R. 2202 – was not enacted. Instead, IIRIRA subsequently was folded into an omnibus bill, reported without change, and enacted as part of that omnibus bill. *See* H.R. CONF. REP. NO. 104–863, at 688 (Sept. 28, 1996); PUB. L. NO. 104-208, §505(a), 110 Stat. 3009, 3009-672 (Sept. 30, 1996).[4]

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because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition. Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools"); 142 Cong. Rec. S11508 (daily ed. Sept. 27, 1996) (Sen. Simpson) ("[w]ithout the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges"); 142 Cong. Rec. S11713 (daily ed. Sept. 28, 1996) (Sen. Simpson) ("[i]llegal aliens will no longer be eligible for reduced in-State college tuition").

[4] This Court routinely relies on legislative history from predecessor bills, *Begier v. I.R.S.*, 496 U.S. 53, 66 & n.6 (1990), and has relied on IIRIRA's Conference Report. *INS v. St. Cyr*, 533 U.S. 289, 318

§68130.5 and AB 540

California precludes illegal aliens from establishing "residence" for tuition purposes. CAL. EDUC. CODE §68062(h). For non-resident U.S. citizens, California ties minors to their parents' residence, *id.* §§68061, 68062(f)-(g), and conditions adults' residence on the "union of act and intent" that they will remain in California "when not called elsewhere for labor or other special or temporary purpose," "return[ing to California] in seasons of repose." *Id.* §68062(b), (d). For U.S. citizens, California requires one year or more of California residence to qualify for "resident" tuition. *Id.* §68017.

In Assembly Bill 540 ("AB 540"), California provided in-state resident tuition to certain students not otherwise qualifying as state residents. 2001 Cal. Stat. ch.814 (enacted as CAL. EDUC. CODE §68130.5). Beyond its alien-based provisions, AB 540 poses three requirements to qualify for in-state tuition: (1) attending a California high school for at least three years; (2) graduating from a California high school or attaining the equivalent; and (3) enrolling in a covered California university or college not earlier than the fall of 2001. CAL. EDUC. CODE §68130.5(a)(1)-(3). With respect to aliens, AB 540 denies in-state tuition for any alien *lawfully* present in the United States, *id.* §68130.5(a), but allows "person[s] without lawful immigration status" (*i.e.*, illegal aliens) to qualify for in-state resident tuition

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(2001). As such, IIRIRA's Conference Report is legislative history for §1623.

by "filing of an affidavit with the [relevant school] stating that the student has filed an application to legalize his or her immigration status or will file an application as soon as he or she is eligible to do so." *Id.* §68130.5(a)(4).

California's Legislature found and declared that AB 540 "does not confer postsecondary education benefits on the basis of residence within the meaning of [8 U.S.C. §1623]." AB 540, §(a)(5). As explained in its legislative history, however, AB 540 enables qualifying nonresidents to pay the in-state "resident" tuition otherwise available only to residents: "Qualifies longterm California *residents,* as specified, regardless of citizenship status, for lower *'resident'* fee payments at the [CCC] and the [CSU]." Assembly Higher Education Committee, Concurrence in Senate Amendments of AB 540 (2001-2002 Reg. Sess.), at 1 (Sept. 7, 2001) (emphasis added) ("2001 Assembly Concurrence").

Enacted the following year, §68130.7 immunizes California schools from retroactive damage awards, further tying §68130.5 to residence in California: "Existing law qualifies specified long-term California *residents,* regardless of citizenship status, for lower *'resident'* fees at CSU and CCC." Assembly Higher Education Committee, Concurrence in Senate Amendments of AB 1543 (2001-2002 Reg. Sess.), at 1 (Jan. 24, 2002) (emphasis added) ("2002 Assembly Concurrence"). Indeed, until changing course without explanation, Governor Davis understood that a predecessor bill violated §1623. Governor's Veto

Message, AB 1197 (2001) *reprinted in* Vol. 1 Clerk's Transcript at 59-60 ("Veto Message").

STATEMENT OF FACTS

The facts are not disputed. U.S. citizens who are not California "residents" must pay out-of-state tuition at the California public universities and colleges covered by §68130.5. By contrast, illegal aliens living in California long enough to have attended and graduated from high school qualify for in-state "resident" tuition, without ever having established legal "residence" in California.

In the California Supreme Court, the University of California acknowledged that the record showed that 390 students out of the approximately 1,500 students who qualified for in-state tuition under §68130.5 were illegal aliens, making illegal aliens 26.0 percent of the benefited class. Relying on judicially noticeable data from the California Department of Finance and the federal Department of Homeland Security, Eagle Forum demonstrated that California's illegal-alien population and total population were approximately 2 million and 38 million, respectively, with illegal aliens' constituting approximately 5.26 percent of the state population.[5]

REASONS TO GRANT THE WRIT

On the merits, *amicus* Eagle Forum supports Martinez on the two questions presented (Sections III and IV, *infra*). In addition, Eagle Forum

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[5] *Amicus curiae* Eagle Forum will lodge the relevant data with the Clerk pursuant to Rule 32.3.

highlights two threshold issues (Sections I and II, *infra*) that further justify this Court's review.

I. Although the California Supreme Court did not reach the presumption against preemption, this case presents two presumption-related bases for review. First, §1621(a) cleared the field of prior state involvement, and this Court should rule on whether such legislative field-clearing provisions negate any otherwise-applicable judicial presumption against preemption. Second, this case presents an opportunity to clarify the presumption's application to federal interests (incentives for illegal aliens), not the impacted state interest (tuition or education).

II. Although the California Supreme Court did not address causes of action, this case presents questions about redressing ongoing violations of both federal laws and federal rights.

III. Until relatively recently (in 1988), 28 U.S.C. §1257 required this Court's review when a state's highest court upheld state law against charges of federal preemption. Even if no longer *required,* review here is warranted by the need to enforce federal law in an area of exclusive federal concern, the demonstrated confusion among the states, and the significant liability to schools – over $200 million *annually* in California alone – if Martinez's position eventually prevails.

IV. By ignoring conflict preemption, California has rejected not only federal law but also the Supremacy Clause itself. California's clear error – amounting to partial secession – requires this Court's review. While analytically the last point in

the argument, this point is absolutely critical to our federal system.

I. §68130.5 DOES NOT TRIGGER THE PRESUMPTION AGAINST PREEMPTION

The California Supreme Court did not rule on the "presumption against preemption," App. 13a, under which courts assume that "the historic police powers of the States [a]re not to be superseded ... unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230. Given the 1996 enactment of §1621 and §1623, however, the congressional purpose was "clear and manifest" with respect to *pre-1996* benefits for illegal aliens, leaving no viable state laws in the preempted field until California and a few other states re-entered the field, post-1996.

As this Court recently recognized, *Santa Fe Elevator* applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and "not ... when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (interior quotations omitted); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). More recently, this Court downplayed the significance of federal presence in the field and held that the "presumption [against preemption] thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine,* 129 S.Ct. 1187, 1194-95 & n.3 (2009). As *Wyeth* explained, the presumption applies – even notwithstanding long-

term federal regulation – because "respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 129 S.Ct. at 1195 n.3 (interior quotations omitted). In other words, states must *presently occupy the field* for the presumption to apply.

In analyzing and applying the presumption against preemption, courts must first determine the field at issue. For example, *Locke* concerned the environment in the form of water quality, but analyzed the narrow *maritime-commerce* field. *Locke,* 529 U.S. at 106-07; *accord Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law or to public health and safety). The inquiry focuses on the federal law, not the state law, so that a decision by Massachusetts to boycott companies that do business with Burma is preempted by U.S. foreign policy with respect to Burma sanctions, notwithstanding Massachusetts' proprietary concern with how Massachusetts spends its own money. *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds). Here, the preempted field is reduced in-state tuition *to illegal aliens,* within the context of the federal government's attempt to control illegal immigration. The field is not higher education generally or even tuition specifically.

In that field, §1621(a) unambiguously cleared away any pre-1996 state involvement. By contrast, *Santa Fe Elevator* cited a 1944 decision where 21 states (of 48) regulated warehouses and 47 states had adopted the Uniform Warehouse Receipts Act. *Santa Fe Elevator*, 331 U.S. at 230 (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-49 (1944)). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation as "public utilities" without any apparent congressional consideration of the issue. *Davies Warehouse*, 321 U.S. at 148-49.

Although ten states have entered the preempted field *since* §1621's enactment, Pet. at 7 n.5, none entered the field *before* Congress enacted §1623. There is no evidence, much less compelling *Davies Warehouse* evidence, that Congress considered either §1621(d) or §1623 to involve a field that the states *already* occupied. In essence, §1621(a) eliminated all states' prior entry into the field of in-state tuition for illegal aliens by "clearly and manifestly" preempting all pre-1996 postsecondary education benefits for illegal aliens. 8 U.S.C. §1621(a). For any post-1996 state entry into the field, Congress enacted §1621(d) and §1623 to regulate prospectively in a field *not* occupied by the states. 8 U.S.C. §§1621(d), 1623. By first clearing the field, then regulating it, Congress achieved a sort of retroactivity, which "often serve[s] entirely ... legitimate purposes, [*e.g.*,] to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress

considers salutary." *Landsgraf v. USI Film Prod.*, 511 US 244, 267-68 (1994).

II. MARTINEZ CAN SUE UNDER BOTH *EX PARTE YOUNG* AND §1983

When this litigation returns to the trial court, Martinez can proceed under both 42 U.S.C. §1983 and the officer-suit fiction of *Ex parte Young*. By way of background, the Court of Appeal found that Martinez failed to preserve the issue of whether §1623 creates an enforceable private right of action, but nonetheless ordered the trial court to allow Martinez to amend the complaint with respect to equal-protection issues, *id.* 99a, and reversed dismissal with respect to Martinez's claims for preemption under §1623 and for injunctive and declaratory relief. App. 91a, 109a. The Court of Appeal did not clarify the specific bases on which the remanded aspects of this litigation would proceed, and the California Supreme Court did not address the issue.

"[T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* Both halves of this two-pronged framework are available in state and federal courts, the former by concurrent jurisdiction, *Haywood v.*

Drown, 129 S.Ct. 2108, 2114 (2009) ("state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law"), and the latter because California courts recognize the *Ex parte Young* doctrine. *Brock v. Superior Court*, 12 Cal.2d 605, 609-10 (1939).

A. Martinez Can Sue under *Ex parte Young*

The Universities cannot contest that Martinez has a cause of action to enforce §1623's preemptive scope by enjoining the defendants' ongoing violations of federal law. *See, e.g., McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 415 (5th Cir. 2004) (it is "misleading[]" and a "misinterpretation" with "no support" to suggest that "that Plaintiffs cannot proceed under *Ex parte Young* unless this court first determines that their claims rely on federal laws that are both constitutional and enforceable against the State"); *Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002) ("[i]t is not necessary for us to determine whether the" federal statute "create[s] rights enforceable under §1983" because a court's general jurisdiction suffices to enter injunctive relief). Thus, with or without §1983, Martinez has a cause of action for equitable and declaratory relief against any ongoing requirements to pay elevated tuition (or educational debt) to California against federal law.

B. Martinez Can Sue under §1983

Martinez also can pursue claims under §1983. Although the Universities have argued that the law-of-the-case doctrine would prevent Martinez from

pursuing preemption under §1983, "[t]he doctrine that a previous ruling has become law of the case has *no application* except as to the decisions of *appellate* Courts." *Lawrence v. Ballou*, 37 Cal. 518, 521 (1869) (emphasis added). "Under the doctrine of the law of the case, a principle or rule that a *reviewing court* states in an opinion and that is *necessary to the reviewing court's decision* must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal." *People v. Jurado*, 38 Cal.4th 72, 94 (2006) (emphasis added). Because the Court of Appeal did not reach the merits of the §1983 issue -- and the merits *a fortiori* were unnecessary to the appellate decision – no law of the case attached.

Significantly, §1983 itself preempts §68130.7's purported limit on damages: "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood*, 129 S.Ct. at 2114; *accord Manta Management Corp. v. City of San Bernardino*, 43 Cal.4th 400, 406-07 (2008). By purporting to disallow damages that §1983 allows, §68130.7 clearly constitutes a preempted "state law that is inconsistent with federal law." *Manta Management Corp.*, 43 Cal.4th at 406-07. As such, California state courts cannot enforce §68130.7 against Martinez's claims.

III. §1623 EXPRESSLY PREEMPTS §68130.5

Section 1623 unquestionably defines two non-domiciliary classes – namely, U.S. citizens attending

public universities in another state and illegal aliens who have been living in that state for several years – and requires that the former class receive in-state tuition if the latter class receives it. *See Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (*overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974)) (discussing creation of statutory classes on the basis of residence). For preemption purposes, the question is how §68130.5's two non-domiciliary classes – namely, those who attended and graduated from California high schools and those who did not – intersect with §1623's two federal classes.

To a great extent, preemption and equal protection overlap. For equal-protection purposes, the question is whether §68130.5's two non-domiciliary classes discriminate either invidiously, *see, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-419 (1948) (citizenship or alienage); *Shapiro*, 394 U.S. at 634 (duration of living in-state); *Vlandis v. Kline*, 412 U.S. 441, 450 n.6 (1973) (right to travel), or irrationally. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319-320 (1993). As analyzed in this Section, the preemption analysis draws on equal protection analysis to determine whether §68130.5 falls within §1623's preemptive scope.

A. §1623 Alone Expressly Preempts §68130.5

The parties dispute the antecedent modified by the statutory phrase "on the basis of residence," *compare* Pet. at 16-25 *with* App. 17a-18a, without considering the breadth of that statutory phrase. But

Congress legislated here in an area of broad historical context, where the statutory "on the basis of" phrase has a "broad sweep." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174-77 (2005). In *Jackson*, the male basketball coach of a women's basketball team stated a claim for discrimination "on the basis of sex" when his school allegedly dismissed him for complaining about sex discrimination against the basketball team. This Court ruled for Mr. Jackson, despite the irrelevance of *his* sex, because Congress would have understood the on-the-basis-of phrase to cover a "sweep as broad as its language," based on prior Court rulings under 42 U.S.C. §1981. *Id.* Similarly, Congress would have understood §1623's on-the-basis-of phrase to cover a broad sweep.

In any event, California obviously has targeted illegal aliens for disparately favorable treatment, in violation of §1623. If a state "target[s]" an "activit[y]" that "happen[s] to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor [or favor] that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). In such circumstances, courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Here, the legislative history of §68130.5 and §68130.7 provide ample evidence

that California intended to treat its illegal aliens as residents,[6] contrary to letter and spirit of §1623.

As explained in the factual background, illegal aliens represented slightly more than five percent of the California's population but ended up with more than twenty-five percent of §68130.5's benefits at the University of California. Courts evaluate such discrimination using a normal distribution, and §68130.5's skewed results represent approximately 36 standard deviations from the "null hypothesis" that illegal-alien status played no part in California's statute.[7] Obviously, 36 is considerably more than two or three standard deviations needed to establish discrimination. *Castaneda v. Partida,* 430 U.S. 482, 494-96 & n.17 (1977). Under the circumstances, any court would readily find evidence that §68130.5 discriminates in favor of illegal aliens, unless *California* could demonstrate that it did not.

Particularly at the demurrer stage of litigation, courts cannot accept statutory criteria that may be surrogates or proxies for forbidden criteria:

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[6] *See* 2001 Assembly Concurrence, at 1; 2002 Assembly Concurrence, at 1; Veto Message, at 1.

[7] The Regents' 20.74% gap in the distribution of §68130.5's benefits (*i.e.*, 26.0% observed versus 5.26% expected) represents 35.97 standard deviations, $(\sqrt[2]{(.0526)(1.000-.0526)/(1500)})$, which corresponds to a probability of essentially zero that the observed 26.0% would occur by chance if §68130.5 applied neutrally, vis-à-vis illegal-alien status.

> Whether [this] should be interpreted as merely applying ... to classifications that are but proxies for differential treatment against out-of-state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of these cases. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim.

Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66-67 (2003). Thus, even if skeptical that Martinez will prove that California intentionally circumvented §1623 with a surrogate criterion, this Court nonetheless must allow the claim to proceed.[8]

For all the foregoing reasons, *amicus* Eagle Forum respectfully submits that §1623's prohibition of residence-based disparate treatment includes attendance-based disparate treatment.

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[8] There is no reason to be skeptical. The Court of Appeal held that California's Legislature intended attendance as a surrogate for residence, App. 78a, and the California Supreme Court essentially agreed. *Id.* 23a-24a.

B. The Statutory and Constitutional Scheme Expressly Preempt §68130.5

To avoid "untenable distinctions," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), courts must consider legislation as a whole, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986), and "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (interior citations omitted). Thus, even assuming *arguendo* that §1621(d) generally would authorize §68130.5, the more-specific, later-enacted provision – which applies "notwithstanding any other provision of law" – nonetheless preempts §68130.5. 8 U.S.C. §1623.

Moreover, Martinez's preemption claims intersect and overlap with his equal-protection claims: "Attacks on state welfare statutes often combine Equal Protection Clause and Supremacy Clause issues." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Townsend v. Swank*, 404 U.S. 282, 283 (1971) (equal-protection and preemption argument based on Social Security Act definition of "dependent child" for student aid); *Moreno*, 458 U.S. at 11 n.16 (*citing* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060-65 (1979) *and* David F. Levi, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979)).

As Professor Perry explained, "[d]iscriminatory state action against aliens impedes implementation

of the federal policy authorizing the alien's residence in the United States," an area where the "federal government's jurisdiction ... is exclusive." Perry, *Modern Equal Protection*, 79 COLUM. L. REV. at 1063. For that reason, the "Court's practice of disfavoring state laws disadvantaging aliens is best understood and justified, therefore, in terms of the supremacy clause principle that no state may take action that would interfere with – and so is presumptively precluded by – congressional immigration policy." *Id.* The same reasoning applies here: federal immigration law has created a class (non-resident U.S. citizens) with in-state tuition rights equal to (or greater than) any such rights of illegal aliens living in a state. By discriminating *in favor of illegal aliens* against a statutory class of U.S. citizens, California violates both the Supremacy Clause and the Equal Protection Clause.

Finally, although the Universities seek cover in the California Legislature's conclusory, self-serving finding that §68103.5 complies with §1623, this Court has rejected the "aberrational doctrine" that "state legislatures [can] nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). Indeed, California's Legislature severely undercut its credibility by hedging its bets:

> If a state court finds that Section 68130.5... is unlawful, the court may order, as equitable relief, that the administering entity that is

> the subject of the lawsuit terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or any other retroactive relief, may be awarded.

CAL. EDUC. CODE §68130.7. In essence, §68130.7 acknowledges that the Universities may lose this litigation and tries to ameliorate the impact of losing.

C. The Legislative History Supports Express Preemption

Although the Universities asked the lower courts to ignore §1623's conference report, courts "look[] to legislative history and other extrinsic material when required to interpret a statute [that] is ambiguous." *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991). "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which *forbids* its use, however clear the words may appear on superficial examination." *U.S. v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940) (footnote and interior quotations omitted, emphasis added). Moreover, a conference report – even one partially at odds with "[t]he statute's plain language and prior legislative history" – nonetheless is "due great weight." *National Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 & n.28 (1983). This Court clearly *may* consult legislative history.

Given the legislative history's unanimous and unambiguous support for Martinez, this is not a case where "legislative history is itself often murky, ambiguous, and contradictory," which can degrade

into "an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568-69 (2005) (interior quotations omitted). If there were legislative history to support the Universities, they would cite it.

IV. FEDERAL LAW IMPLIEDLY PREEMPTS §68130.5, NOTWITHSTANDING EXPRESS PREEMPTION AND SAVINGS CLAUSES

Even if neither §1623 nor §1621 *expressly* preempts §68130.5, federal immigration law nonetheless would *impliedly* preempt §68130.5 for conflicting with the "compelling ... [federal] interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6); H.R. CONF. REP. NO. 104–725, at 378. The California Supreme Court rejected conflict preemption here, based on the presence of express preemption and a savings clause, App. 30a-31a, committing clear error inconsistent with this Court's recent preemption cases. In doing so, the California Supreme Court nullified not only an act of Congress but also the Supremacy Clause itself.

Under conflict preemption, the Supremacy Clause "nullifies" both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that prevent or *frustrate* the accomplishment of a federal objective." *Geier*, 529 U.S. at 873-74 (interior quotations omitted, emphasis added); *cf. Crosby*, 530 U.S. at 373 n.6 (because "the categories of preemption are not rigidly distinct[,] ... field pre-emption may be understood as a species of conflict pre-emption")

(interior quotations omitted). Conflict preemption applies either where "significant conflict exists between an identifiable federal policy or interest and the [operation] of state law" or where "the application of state law would frustrate specific objectives of federal legislation." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-08 (1988) (interior quotations omitted, alteration in original). To emphasize, *impossibility is not required:* Frustration suffices. *Moreno,* 458 U.S. at 16.

As Martinez explains, Pet. at 28-33, California's position ignores this Court's holding in *Geier* that conflict preemption applies, notwithstanding express preemption and savings clauses. *Geier,* 529 U.S. at 873; *Buckman,* 531 U.S. at 352. California's rejection of both federal law and the Supremacy Clause itself requires this Court's supervision.

In a dual typographical and interpretive error, the California Supreme Court cites §1621(c) as expressly allowing California to provide in-state tuition to illegal aliens. App. 31a. First, the correct citation is §1621(d). Second, §1621(d) is not a savings clause: it did not "save" existing law. Quite the contrary, §1621(a) expressly preempted *all* then-existing state laws. 8 U.S.C. §1621(a); H.R. CONF. REP. NO. 104–725, at 383. At best, §1621(d) is a safe harbor for post-enactment state laws. Moreover, for tuition, the later-enacted §1623 – like §1621(a) – applies "notwithstanding any other provision of law." 8 U.S.C. §1623. Bedrock principles of statutory construction trebly preclude §1621(d)'s limiting the

more-specific, later-enacted §1623 that applies notwithstanding §1621(d).

Significantly, the federal interests here fall in an area of exclusive federal concern:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States [and] *regulation of their conduct before naturalization[.]* Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission [and] residence of aliens in the United States or the several states.

Takahashi, 334 U.S. at 419 (citations omitted, emphasis added); *Moreno,* 458 U.S. at 10. For conflict in areas of "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Boyle,* 487 U.S. at 507-08 (interior quotations omitted).

As indicated in Section I, *supra,* the field here is illegal aliens' eligibility for beneficial treatment, vis-à-vis U.S. citizens, under compelling federal interests in removing any incentives that beneficial treatment provides to illegal aliens. 8 U.S.C. §1601(6); H.R. CONF. REP. NO. 104–725, at 378. Using high school attendance in lieu of residence easily *frustrates* the federal interest. Certainly, §68130.5 frustrates that interest more than discrimination against *legal* aliens frustrated their favorable federal tax treatment in *Moreno, supra.* Even if §1623 does not *expressly* preempt California's tuition benefits for

illegal aliens, federal immigration law *impliedly* preempts §68130.5.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

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